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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1358

NORMAN SLONE
Petitioner

V.

BLOCKSOM & COMPANY,
A Corporation
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI
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Petitioner, Norman Slone, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit

is not recorded.

The opinion of the United States District Court for the Eastern District of Virginia, Norfolk, Division, is not recorded.

JURISDICTION

The date of the judgment of the United States Court of Appeals for the Fourth Circuit was June 25, 1979. The date of the judgment of the United States Court of Appeals for the Fourth Circuit denying the petition for a rehearing was December 7, 1979. No order was entered granting an extension of time in which to petition for certiorari. The statutory provision believed to confirm this Court's jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

I. Was fraud pleaded under Federal

Rules of Civil Procedure 8 (c), 9 (b)?

II. Did the evidence support the findings of the District Court or were the findings of the District Court clearly erroneous?

III. Was the law relied upon by the District Judge applicable to the evidence in this case?

IV. Did respondent rely in the District Court upon theories other than fraud?

V. Did the District Court err in failing to grant the motion for a new trial filed by petitioner?

VI. Did the Court of Appeals err in refusing the petition for a re-hearing, based upon points of law and fact overlooked or misapprehanded as follows:

1. Improper Oral Argument of Appellee's Counsel.

2. No evidence to support the

findings of the District Court.

3. No evidence that Blocksom relied on Slone's representation.

4. Sole remedy of Blocksom is under Va. Uniform Commercial Code §8.2-511 and §8.2-702 (2), Code of Va.

5. Fraud was not pleaded under Rules 8 (c), 9 (b), Federal Rules of Civil Procedure.

6. Blocksom denied Slone made any misrepresentation. Blocksom failed to prove Prestige was hopelessly insolvent in March and April 1976.

STATUTES INVOLVED

The statutes involved are:

1. Federal Rule of Civil Procedure 9 (b), 8 (c).

2. Code of Va. §8.2-511, Official Comment 6.

3. Code of Va. §8.2-702.

4. Code of Va. §8.2-106 (1).

5. Code of Va. §8.2-401 (2).

6. Code of Va. §8.01-45.

STATEMENT OF THE CASE

The complaint sought judgment against Prestige Spring Corporation and Norman Slone, consisting of Counts I, II, and III. At the trial, the appellee proceeded solely against Norman Slone because Prestige Spring Corporation had filed bankruptcy and was dismissed without prejudice by the court. Count I of the complaint alleged that Prestige Spring Corporation was indebted to Blocksom on open account in the sum of $26,401.15, plus interest, as shown by statement of account verified by affidavit attached and made a part of said Count. Count III alleged that Prestige Spring Corporation was indebted because Prestige, by its president Norman Slone, confirmed a settlement agreement, con-

ditioned upon payment of the amount claimed less 20%, if paid by January 10, 1977; that the 80% was not paid. This Count was abandoned by appellee at the trial.

The only Count relating to Norman Slone was Count II which stated:

> "1. In order to induce the plaintiff to ship additional merchandise, the defendant, Norman Slone, president of defendant Prestige Spring Corporation, tendered to plaintiff two post-dated checks, one dated April 16, 1976, in the amount of $7,510.00, and the other dated April 28, 1976 in the amount of $8,448.75, both issued by the said Norman Slone.
>
> "2. After the plaintiff had made shipment of invoice dated April 6, 1976, number 48687, in the amount of $10,442.40, the said Norman Slone, or some other person authorized to act for Prestige Spring Corporation, caused payment to be stopped on the check of April 16, 1976; and the check dated April 28, 1976 was not deposited for collection for the reason that it was apparent that to do so would be a futile gesture, copies of said checks being attached and made a part hereof."

The statement of account attached to the complaint was dated February 16, 1977 and was addressed solely to Prestige Spring Corporation as the party owing the money.

The joint answer to the complaint was filed on behalf of Prestige Spring Corporation and Norman Slone as well as the motion to dismiss on behalf of Norman Slone on the ground that the complaint failed to set forth any cause of action upon which relief can be granted against him. Both Norman Slone and Prestige Spring Corporation filed separate counterclaims. The counterclaim of Norman Slone alleged that on or about December 2, 1976, Blocksom, maliciously through its employee Ralph Marks, while engaged in the ordinary course of his employment spoke of Norman Slone words which from their usual construction and

common acceptation are construed as insults and tend to violence and breach of the peace to-wit, that said defendant fraudulently induced Blocksom to deliver merchandise to Prestige Spring Corporation with no intention to pay, that Blocksom authorized the action of the said employee, subsequently ratified it and as a proximate result Norman Slone suffered damages, including exemplary damages. The demand was for $500,000.00. Blocksom filed an answer to the counterclaim of Norman Slone. The answer denied each allegation of the counterclaim and stated that it failed to state a claim against Blocksom on which relief can be granted.

Blocksom filed two separate sets of interrogatories which were duly answered. Subsequent thereto Blocksom filed a motion for summary judgment in the sum

of $15,958.75, based upon the complaint, answer, interrogatories to Norman Slone and Norman Slone's answers to interrogatories and attached a written brief in support of the motion. The brief of Blocksom contended that Norman Slone individually was liable for the amount of the checks which he, acting as an officer of Prestige Spring Corporation stopped payment, on the ground of Article III of the Uniform Commercial Code or by reference to the Law of Agency. The court overruled the motion for summary judgment. An inspection of appellee's brief shows that appellee relied upon the Uniform Commercial Code by reference to certain sections of the code (pages 4-7 of its brief). At the trial, the court, after all evidence was heard, ruled that Norman Slone was not liable individually under the Uniform

Commercial Code for stopping payment on the post-dated checks. The other ground mentioned in its brief that Norman Slone was guilty of conversion as an inducement for Blocksom to make the final shipment of merchandise to Prestige Spring Corporation in the amount of $10,442.40. Blocksom relied in its brief upon two cases to-wit, Beckwith v. Independent Transfer & Storage Company, 105 W.Va. 26, 14 S.E. 443 (1928) and Buckeye National Bank v. Huff & Cooke, 114 Va. 1, 75 S.E. 769 (1912). Neither case is in point, differing in its facts and on the law.

In its memorandum order of August 19, 1977 the court, by Judge Richard E. Kellam, ruled that defendants had a right to raise the issue that the goods were not in accordance with their warranty or merchantable and an issue exists as to

whether the defendants were separately or jointly liable.

Norman Slone filed a brief in support of his motion to dismiss the complaint, pointing out that Count II does not allege there is any certain sum due and owing by him or by Prestige Spring Corporation, simply reciting that one check, post-dated, was not paid, by either Norman Slone or some other person authorizing the act for Prestige Spring Corporation stopping payment and that the other check was not deposited by plaintiff. Each of the two checks was written on the account of Prestige Spring Corporation on Virginia National Bank account number 16 4169 4, that Norman Slone signed the two checks on behalf of the corporation; the check dated 4/28/76 has the words "post dated to 4/28". The brief contended that Norman Slone was

acting as agent for a disclosed principal and was not liable for the debts of Prestige Spring Corporation, relying on §8.3-403, Code of Va.

The brief of appellee opposing the motion of Norman Slone to dismiss the complaint contended at paragraph 2 of its brief:

> "The legal theories have already been discussed in the plaintiff's brief in support of its motion for summary judgment to which the Court is referred. Briefly we argued that Norman Slone had no jurisdiction for stopping payment on the checks. We pointed out that he inspected the merchandise within a few days after its delivery and although he claims that the merchandise was defective, he still sent these checks many weeks after inspection. We next pointed out that if Norman Slone had no jurisdiction for stopping payment on the checks, then he would be liable either under the UCC or by reason of conversion of the plaintiff's property."

At no time prior to trial did the appellee plead in its complaint, nor in

its two briefs supporting its motion for summary judgment and opposing the motion to dismiss Norman Slone, any allegation of fraud against Norman Slone. In the memorandum order entered November 7, 1977 denying the motion to dismiss the complaint on behalf of Norman Slone, Judge MacKenzie wrote at pages 2 and 3 of the order as follows:

> "Accepting the allegations of Count II as true, it cannot be said that plaintiff is entitled to no relief under any state of facts. The complaint in its simplest form states that Norman Slone is liable as the signer of a draft. It is a common principle under the Uniform Commercial Code that the drawer of a draft is personally liable for its payment if, when presented for payment, the bank rightfully refuses to honor the check. Code of Va. §8.3-413 (2). It is equally clear that Count II on its face creates an action in tort for conversion.
>
> "Plaintiff does not concede the existence of an agency relationship between defendants. Under these circumstances, it is

incumbent upon the defendant Slone at trial to establish any defenses to these actions, such as the existence of an agency relationship. Such proof is a matter for the jury to decide and cannot be decided on a motion to dismiss."

Judge MacKenzie construed Count II as setting forth an action in tort for conversion or that Norman Slone was liable as the signer of a draft. There is nothing in the order of Judge MacKenzie as to any fraud relied upon by Blocksom.

In its statement of issues filed September 16, 1977 the appellee stated the issues were:

"1. Whether Prestige Spring Corporation is indebted to Blocksom and Company on an open account, and if so the extent of its indebtedness.

"2. Whether Norman Slone, by reason of his acts, is jointly and severally liable with Prestige Spring Corporation for said indebtedness.

"3. Whether the plaintiff, acting through its employee Ralph Marks, made statements about Norman Slone which are either slanderous or actionable under the insulting words statute, Virginia Code Section 8-630, and, if so, whether Norman Slone has suffered damages as a proximate result thereof."

Again, there is no contention of any fraud on the part of Norman Slone by appellee.

At page 6 of the order on final pretrail conference entered by Judge Clark on December 28, 1977, the same issues verbatim are set forth in paragraph 5 (a) with some change as to the issue as to the counterclaim in paragraph 3 and an additional issue as to the counterclaim in issue number 4. The only issue raised by Blocksom was whether Norman Slone, by reason of his acts is jointly or severally liable with Prestige Spring Corporation for the indebtedness of Prestige Spring

on open account. No fraud is alleged.

At the trial, before the court, sitting without a jury, heard any evidence, the court required counsel to retire and prepare a stipulation of facts. Counsel complied with the Judge's oral order and presented a stipulation of facts signed by counsel. The stipulation reads as follows:

> "1. There is diversity of citizenship and that this court has jurisdiction.
>
> "2. The merchandise represented by the following invoices were shipped by the plaintiff and received by Prestige Spring Corporation as follows:
>
> > "(1) Invoice #46616 dated 1/23/76, received 1/26/76.
> >
> > "(2) Invoice #47173 dated 2/27/76, received 3/3/76.
> >
> > "(3) Invoice #48084 dated 3/25/76, received 3/28/76.
> >
> > "(4) Invoice #48687 dated 4/6/76, received 4/9/76.

> "3. Norman Slone, on behalf of Prestige Spring Corporation, inspected the said merchandise within a week of receipt of each delivery.
>
> "4. Prestige Spring Corporation has made no payment on said invoices.
>
> "5. Norman Slone was Vice-President and Secretary of Prestige Spring Corporation during all times in question. Arnold Slone was President and Treasurer of Prestige Spring Corporation during all times in question. Norman Slone had authority to sign checks on behalf of Prestige Spring Corporation whose checking account was with the Virginia National Bank, check account number 1641694.
>
> "6. Prestige Spring Corporation check #17032, dated 4/16/76 to the order of plaintiff in the sum of $7,510.00 was signed by Norman Slone, who later directed the Virginia National Bank to stop payment on the check, which was postdated.
>
> "7. Prestige Spring Corporation check #17115, dated 4/28/76, to the order of plaintiff in the sum of $8,448.75 was signed by

Norman Slone, who later directed the Virginia National Bank to stop payment on the check, which was postdated.

"8. There was a telephone conversation between Ralph Marks, credit manager of the plaintiff, and Norman Slone, Vice President of defendant, on or about December 2, 1976.

"9. Plaintiff's statement to Prestige Spring Corporation dated February 16, 1977, shows the four invoices, the amounts, and a credit."

In his opening statement to the court, Mr. Weintraub stated that there were no serious facts in dispute as to plaintiff's claim which was in the amount of $15,958.75, plus interest from April 19, 1976, representing the total of two post-dated checks on which payment was stopped by Norman Slone acting on behalf of Prestige Spring Corporation. The Judge remarked what was the significance of the checks being post-dated and if Norman Slone personally offered an

inducement to Blocksom to ship and thereafter to stop payment. Mr. Weintraub cited 19 U.C.C. Reporting Service 587, relying on Griffin v. Ellinger, a 1976 Texas case, §8.3-413 (2), 8.3-510 and 8.3-403, Code of Va. He pointed out that there were four separate shipments in January, February, March and April, 1976. After the first two shipments were made, Prestige Spring Corporation wanted more merchandise. At the time the balance due was $7,510.00 as of April 16, 1976. In late March, 1976, Mr. Slone told Blocksom he would send a check for $7,510.00 to pay for the prior shipments on behalf of Prestige Spring Corporation if Blocksom would send more merchandise. Before shipping its third invoice, plaintiff received a post-dated check for $7,510.00 dated April 16, 1976 check number 17032 from Prestige Spring

Corporation. Prestige Spring Corporation ordered more merchandise and sent another post-dated check dated April 28, 1976 in the sum of $8,448.75. Mr. Weintraub contended Norman Slone was also liable on theory of conversion. He told the court that Blocksom's employee Marks did not speak the words claimed in the counterclaim of Norman Slone.

The only witness who testified on behalf of Blocksom at the trial was Ralph Marks, other than Norman Slone called as an adverse witness. Without objection, Blocksom offered the following plaintiff's exhibits:

"1. Letter of Ralph H. Mark, dated 12/15/76 to Prestige Spring Corporation, to the attention of Norman Slone.

"2. Letter of Prestige Spring Corporation signed by Norman Slone dated 12/2/76 to Ralph H. Mark.

"3. Prestige Spring Corporation check dated 4/16/76.

"4. Prestige Spring Corporation check dated 4/28/76.

"5. Invoice #46116 of Blocksom & Company.

"6. Invoice #47173 of Blocksom & Company.

"7. Invoice #48084 of Blocksom & Company.

"8. Invoice #48687 of Blocksom & Company.

"11. Blocksom and Company statement of account with Prestige Spring Corporation.

"12. Counterclaims filed by Prestige Spring Corporation and/or Norman Slone."

Mr. Marks testified that he was the credit manager of Blocksom for the past 18 years, was familiar with its accounts. In 1976 Blocksom owed Prestige the sum of $43.00 represented as a credit balance. The shipments of Blocksom to Prestige in January and February, 1976 totaled $7,553.32 (Pl. Ex. 5, 6). In March 1976, Mr. Marks wanted payment for the first two invoices which had been

shipped. He spoke to either Arnold Slone or Norman Slone and requested a post-dated check from Prestige Spring Corporation before he would release invoice number 48084 in March, 1976 (Pl. Ex. 7). The March 25, 1976 invoice was shipped after the check dated April 16, 1976 for $7,510.00 was to be due and payable on April 16, 1976. In April Prestige wanted additional merchandise and Mr. Marks requested another post-dated check dated April 28, 1976 in the sum of $8,448.75. The last invoice was dated April 6, 1976 and was received on or about April 9, 1976 by Prestige. The post-dated checks were plaintiff's exhibit 3, 4.

In the week of April 16, 1976 Mr. Marks phoned Norman Slone who told Mr. Marks to hold the check to April 20th, 1976. On April 23, 1976 Mr. Marks

received a call from Norman Slone requesting that he not put the check in for deposit. Mr. Marks told Mr. Slone there was nothing there to hold. Mr. Marks denied there was any complaint made by Norman Slone as to any merchandise being defective. He testified he would not have released the March and April merchandise if he had not received a check for $7,510.00 dated April 16, 1976 and a post-dated check dated April 28, 1976 for $8,448.75 from Prestige Spring.

On cross-examination, Mr. Marks admitted that Blocksom had received the post-dated checks from Prestige, commencing January 1, 1975 and each post-dated check had always been honored. He received both post-dated checks before authorizing the March and April shipments.

Mr. Norman Slone, called as an adverse witness, testified that he was Vice President and Secretary of Prestige Spring Corporation. He stated that the assets of Prestige were greater than its liabilities at the time Prestige purchased the additional merchandise from Blocksom. He stopped payment on the two checks because the goods were defective, having received complaints from customers and, in addition, Blocksom had given Prestige a distributorship but Blocksom was a competitor. In response to a question by the court, Slone testified that Prestige first learned that Blocksom was not keeping its bargain as to exclusive distributorship to Prestige by learning that a company known as Bristol Bedding Company was buying directly from Blocksom. Some customers of Prestige used the defective merchan-

dise. Other merchandise was sent to the dump.

After Blocksom rested its case, counsel for Norman Slone moved for a directed verdict which the court took under advisement during the luncheon recess. The grounds for the motion were:

1. There was no proof that Norman Slone lacked authority to issue the post-dated checks;

2. There was no proof that Norman Slone signed the two post-dated checks in a capacity other than an officer of Prestige;

3. There could be no conversion since title to the merchandise passed to Prestige upon delivery under the Uniform Commercial Code; there was no fraud pleaded and there was no proof by Blocksom of a misrepresentation of a past or

present fact.

After returning from lunch, Judge Clarke stated that Blocksom was proceeding on two theories:

1. Under the Uniform Commercial Code, §8.1-403 (b), the court found that parol evidence is admissible to show that Norman Slone signed as an agent and not in an individual capacity and there was no liability under the Uniform Commercial Code;

2. On the theory of conversion, the Judge said there was sufficient evidence to proceed under the theory of fraud leading to conversion but that Federal Rule of Civil Procedure 9 (b) was not complied with. Judge Clarke denied the motion for Blocksom to be able to amend the complaint to allege fraud.

On his behalf, Norman Slone testified

that at the time he issued the two post-dated checks on behalf of Prestige Spring Corporation, he had no present intention to stop payment on the two checks; that all past post-dated checks given to Blocksom from 20 to 30 post-dated checks, were honored; that he did not tell Mr. Marks he would give post-dated checks if Blocksom shipped future merchandise; that he stopped payment on the two post-dated checks because of defective merchandise; that Prestige did not have sufficient funds in the bank at the time the post-dated checks were issued. In addition Mr. Slone testified that on December 2, 1976 he had a telephone conversation with Mr. Marks who stated that Mr. Slone fraudulently induced Blocksom to deliver merchandise to Prestige with no intention to pay, that

he was embarrassed from the conversation.

On cross-examination, Mr. Slone testified that Mr. Marks called him and that he was upset by the insulting words.

On rebuttal, Mr. Marks denied the December 2, 1976 conversation with Mr. Slone. He never accused Mr. Slone of attempting to defraud Blocksom. He did not know of any employee of Blocksom who ever accused Norman Slone of attempting to defraud and never wrote Mr. Slone of any accusation of attempting to defraud Blocksom.

In closing argument after the court remarked that in order for Norman Slone to be guilty of fraud he must have had a present intent at the time the two post-dated checks were issued that they would not be honored at time of the

date of the checks, Mr. Israel Steingold told the court that Blocksom, when it filed the complaint, was relying on the Texas case of an officer of a corporation being liable in an individual capacity.

The court rendered an oral opinion from the bench at the conclusion of argument, pointing out that the court was relying on 18 Am. Jur. 2d §28 Fraud & Duress, on Manley v. Ohio Shoe Co. 25 F. 2d 344; that Blocksom had the burden to prove that there was an intention on the part of Norman Slone for the Prestige checks to be dishonored at the time of issuance of these checks before it could recover on the theory of conversion; that if an officer of a corporation performs a fraudulent act, he is personally responsible. As to the counterclaim on insulting words,

the Judge denied the counterclaim on the ground there was no proof of damage and no proof that Norman Slone was insulted. The Judge remarked that the position of Norman Slone that he stopped payment on the checks because the merchandise was defective and Blocksom had breached its exclusive dealership was not consistent with his answers to interrogatories. The court was of the opinion that defense of Norman Slone was specious, with an inference that Norman Slone never intended that either check would be honored when he issued same, that Mr. Slone exercised fraud in the inducement. As to whether the complaint sufficiently alleged fraud under Federal Rule of Civil Procedure 9 (b), the Judge remarked the purpose was to notify an adverse party that fraud is

relied upon, that the evidence of fraud was clear and convincing and that it was clear to the court that Count II of the complaint, with the statement of facts by plaintiff at page 5 of the final pre-trial conference order that the plaintiff intended to prove that Norman Slone issued the Prestige checks without any intent to honor the checks was sufficient notice to Norman Slone to represent a compliance with Federal Rule of Civil Procedure 9 (b) and adequately informed Slone of fraud.

On January 27, 1978, Slone filed a 14 page motion for new trial, to reopen the judgment entered against him, to amend findings of fact and conclusions of law or make new findings and conclusions, direct the entry of new judgment against Blocksom and in favor of Slone

and requested the court to make findings of fact and conclusions of law as set forth therein, pursuant to Federal Rule of Civil Procedure 59 (a).

REASONS FOR GRANTING THE WRIT

I. The judgment was a miscarriage of justice as to petitioner. The complaint had Counts I and III applying solely to the defendant Prestige Spring Corporation, alleging an open account in Count I and a settlement as to Count III. The only allegation as to petitioner is in Count II which alleged that petitioner, President of Prestige Spring Corporation, in order to induce the plaintiff to ship additional merchandise, tendered to plaintiff two post-dated checks; after plaintiff had made shipment, petitioner or some other person authorized to act for the corporation, caused payment to be stopped

on one post-dated check, and the second post-dated check was not deposited for collection for the reason that to do so would be a futile gesture. The District Judge, in refusing leave to respondent to amend the complaint after respondent rested its case, for the purpose of alleging fraud, stated that the statement of facts by respondent at page 5 of the final pre-trial conference order that respondent intended to prove that Norman Slone issued the post-dated checks without any intent to honor the checks was a compliance with Federal Rule of Civil Procedure 9 (b).

Rule 9 (b) states that in all avermants of fraud, the circumstances constituting fraud shall be stated with particularity. Pleading elements of fraud is required. Owen v. Commercial

Union Fire Ins. Co., 211 F. 2d 488 (C. A. 4 1954). Acts for fraud not particularized in the complaint shall be refused. Ruffin v. Division Three, Nat. R. R. Adjustment Bd., 368 F Supp. 990, 996 (D. Pa. 1973).

II. Respondent relied upon theories other than fraud which were conversion, open account and agreed upon settlement. If there was a settlement, as alleged in Count III of the complaint, there could be no reliance by respondent on any alleged misrepresentation, if there was any, by petitioner. Respondent had accepted at least 20 to 30 post-dated checks from Prestige since January 1, 1975.

III. The law relied upon by the District Judge in entering judgment in favor of respondent did not apply to the evidence in the case. In the Judge's

oral opinion dictated at the conclusion of final argument, the court relied upon Manley v. Ohio Shoe Co., 25 F. 2d 384 (4th Cir. 1928), which appears also in the court's memorandum order of February 10, 1978, denying the motion of Slone for a new trial and to order judgment entered in his behalf. This 1928 case has no application to the facts on this appeal. In Manley v. Ohio Shoe Co., supra, the creditor alleged that the bankrupt had obtained certain shoes which were in the possession of the bankruptcy trustee by fraud and false representations as to his financial condition, elected to rescind the sale on that account, and that the goods could be readily identified. At the time the shoes were ordered, the bankrupt was hopelessly insolvent and had no reasonable expectation of

being able to pay for them. The bankrupt concealed this insolvency condition from the creditor. The shoes were shipped in June to be paid by August 15. Bankruptcy was filed in August. Petitioner had had no prior dealings with the bankrupt. The creditor accepted the order and extension of credit based upon a credit rating in the latest book of R. D. Dunn & Co. to which petitioner was a subscriber. This Book rated the bankrupt as worth from $125,000.00 to $200,000.00 and his credit as being first rate, based on a financial statement furnished by bankrupt in January, with assets exceeding liabilities by $220,000.00 and a surplus exceeding $120,000.00. The truth was that the bankrupt was hopelessly insolvent. The court held that the petitioner was entitled to reclaim its goods and

to rescind the contract where it was shown that the bankrupt was insolvent at the time of the purchase, concealed such insolvency and did not intend to pay for the goods, obtained goods by means of false material representations as to his financial condition which were relied on by the seller in making the sale on credit. The intent not to pay was proved by evidence that when the bankrupt gave the order for the shoes, his officers knew that it was hopelessly insolvent and had no reasonable prospect of paying for them except by giving an unlawful preference to the seller.

In the case before this court, Slone did not conceal from Blocksom that Prestige was in financial difficulty. By its acceptance of post-dated checks commencing January 1, 1975, Blocksom

had actual knowledge of the financial problems of Prestige. It was Blocksom that demanded the two post-dated checks from Prestige dated April 16, 1976 and April 28, 1976. At that time of issuance of these two checks, the credit manager of Blocksom knew that the checks at time of issuance could not be honored by the bank. Blocksom expected the checks to be honored in the future on the due dates of these checks. The plaintiff failed to prove that at the time of the issuance of these two post-dated checks, Prestige was hopelessly insolvent and had no reasonable prospects of paying for them. All prior post-dated checks in 1975 issued by Prestige to Blocksom had been honored. In addition, Prestige continued its business until May 31, 1977.

Under Virginia law, to constitute a

fraudulent misrepresentation, the representation must be either of a past fact or a present fact at the time of representation and cannot be a representation of a future fact. Costello v. Larsen, 182 Va. 567, 20 S.E. 2d 856 (1944); Soble v. Herman, 175 Va. 489, 9 S.E. 2d 459 (1940); Max Meadows Land & Imp. Co. v. Brady, 92 Va. 71, 22 S.E. 845 (1895).

A post-dated check is a mere promise to discharge a present obligation at a future date. It is not a false representation of a present existing fact. A post-dated check differs from an ordinary check in that it has on its face an implied notice that there is no money presently on deposit available to meet it, with an implied assurance that there will be such funds on the day it becomes due. Non-performance of a future pro-

mise does not constitute fraud. The purpose of a post-dated check is to obtain an extension of credit. Commonwealth v. Kelvison, 199 Pa. Super. 135, 184 A.2d 374 (1962).

In its oral opinion at the trial, the court relied on 18 Am. Jur. 2d Conversion, §28 which states that a person who obtains possession of goods by duress or fraud may be liable for the conversion thereof. In the same volume §1, page 158, it is said:

> "A conversion is a distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with its title or rights therein, or in derogation, exclusion, or defiance of such title or rights."

The evidence shows that Blocksom shipped and delivered the first two invoices in January and February 1976. Title and possession to such goods upon delivery passed to Prestige. §8.2-106

(1), Code of Va., states that a sale consists in the passing of title from the seller to the buyer for a price. §8.2-401 (2) states that unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place.

In the memorandum order of the court overruling the motion for a new trial, dated February 10, 1978, at pages 2 and 3 the court quoted extensively from the case of Lloyd v. Smith, 150 Va. 132, 142 S.E. 363, 365-366 (1928). The court affirmed a final judgment sustaining a demurrer to the motion for judgment, with the plaintiff failing to file an amended

motion for judgment. The court held that bare allegations of fraud will not support an action for damages but facts showing fraud and resulting damages must be alleged. The allegation was on defendants' fraudulent promise to reconvey land, causing plaintiff to part with it by permitting debt secured by deed of trust to come in default. The motion for judgment failed to allege readiness or ability of plaintiff to perform or a demand for reconveyance or the inability of the defendants or refusal to perform.

The court also contended at page 2 of said memorandum order that Slone represented that his corporation was solvent and intended to pay for the goods when in fact it was hopelessly insolvent and intended not to pay. There was no evidence to support such a finding. Furthermore §8.2-702 (2), Code of Va., sets forth the

remedy of the seller in the event of the buyer's insolvency as follows:

> "Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three months before delivery the ten day limitation does not apply. Except as provided in this subsection the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or an intent to pay."

In Re Helms Veneer Corp., 287 F.Supp. 804 (W.D. Va. 1968) the issue before the court was whether the referee in bankruptcy erred in holding that three suppliers of lumber to the bankrupt were to be paid in full as priority claims. In construing §8.2-511, §8.2-702, Code of Va., in reversing the referee in bankruptcy, the court held that title passed to the bankrupt on two of the claims upon delivery where the evidence showed that

payment was to be made in the future. In the third claim, the bankrupt gave a check for the major part of the shipment and promised payment on the remaining balance in the future. The check was returned because of insufficient funds, again submitted to the bank and returned for the same reason, and the claimant then demanded the return of the logs. The District Court held that where the seller failed to reclaim his goods within 10 days from delivery of the goods, he waives that right and the remedy of the seller is on the check or for breach of contract, and the seller's rights are reduced to those of a general creditor in arrangement proceeding under the Bankruptcy Act by the buyer.

It is conceded that Blocksom never made any written demand upon Prestige for a return of the merchandise under any

of the four invoices involved in this case. In fact, Blocksom did not retain a lien on any of the merchandise by way of a security instrument. Blocksom was interested only in payment for the invoices.

IV. The Court of Appeals erred in denying the petition for a rehearing. The points of law and fact overlooked or misapprehended were:

1. Counsel for respondent, in his oral argument before the court on April 5, 1979, urged the court to affirm the judgment of the U.S. District Court because the U.S. Bankruptcy Court in 1979 entered a judgment based on fraud against Norman Slone and his brother Arnold Slone on a third-party complaint filed by Beril Abraham, Trustee in Bankruptcy for Prestige Spring Corporation, the original complaint against Mr. Abraham having been

filed by the Small Business Administration. The trial of the case on appeal in that court took place in January of 1978. The 1979 judgment is not in the Appendix. Such argument was improper, was not based upon the record in this case, and apparently was intended to cause the court on appeal to look with disfavor on Norman Slone. From the record in this case, petitioner is unable to state that such argument had no effect upon affirming the District Court. Petitioner respectfully requested the court to transcribe that part of the oral argument of counsel for respondent in this respect.

2. The opinion of the Court of Appeals stated that the findings of the District Court are not clearly erroneous. The opinion states that the District Court found that Slone had induced Blocksom to deliver to Prestige goods by

his personal representation that Prestige was solvent and intended to pay for the goods, when he knew at the time that Prestige was hopelessly insolvent and had neither the ability nor the intent to pay for the goods so delivered by Blocksom.

There is no evidence in the record to support such a finding of the District Court. At oral argument, counsel for petitioner told the court that he had read the record five times and could find nothing in the record to support such a finding. Judge Russell asked counsel for respondent to point out in the record where such representation was made by Slone. Counsel for respondent was unable to do so.

Petitioner respectfully requested the court, pursuant to Rule 40, to request counsel for respondent to file an answer to the Petition for Rehearing, specifi-

cally pointing out in the Appendix where Slone made such a statement.

3. Assuming that such a statement or personal representation was made by Slone, there was no evidence that respondent relied on such representation, which is a necessary ingredient of a fraudulent misrepresentation. The Court of Appeals for the Fourth Circuit in the case of In The Matter of Joseph Lynn Walker, Joseph Lynn Walker, Appellant, v. Harry Kohlberg, Appellee, Record Number 77-1308, reversed a judgment of the District Court in Norfolk on the ground that Kohlberg did not reasonably rely on the statements made by Walker that Walker was solvent, that Walker had funds to repay Kohlberg on demand, that Walker knew that he was not solvent and that he did not have funds to pay, that Walker intended to induce Kohlberg to advance the money on

the basis of misrepresentation, that Walker obtained money from Kohlberg by means of pretenses and false representations, that Kohlberg relied on such representation as to his judgment. In the Opinion the court stated that in order to prove that this debt was non-dischargeable under Section 17 (a) (2), Kohlberg must prove that he reasonably relied on the representations made by Walker. Sweet v. Ritter Finance Co., 263 F.Supp. 540 (W. D. Va. 1967).

Under Virginia law, one who seeks to hold another in fraud must clearly show that he has relied upon the acts and statements of the other. Harris v. Dunham, 203 Va. 760, 127 S.E. 2d 65 (1962); Piedmont Trust Bank v. Aetna Cas. & Sur. Co., 210 Va. 396, 171 S.E. 2d 264 (1969).

The evidence in this case is that at the end of 1965 Blocksom was indebted to Prestige in a small credit balance amount.

During 1965, Prestige sent postdated checks to Blocksom regularly. Blocksom shipped merchandise in January, February, March and April 1966 to Prestige. The shipments in January and February were not paid. Blocksom requested Prestige in March 1966 to issue a post-dated check for the exact amount owed on the January and February 1966 shipments, less the credit balance due Prestige, which Prestige did and Blocksom shipped to Prestige in March. Likewise in April 1966 Blocksom requested Prestige to issue a post-dated check to cover the March 1966 shipment, which Prestige did. There is absolutely no evidence in the record that Blocksom relied on any alleged misrepresentation by Slone to get merchandise shipped during these four months in 1966.

4. The cases relied upon by the

District Court were decided before Virginia adopted the Uniform Commercial Code. §8.2-511, Code of Va., Official Comment 6, states that where the instrument offered by the buyer is not a payment but a credit instrument such as a note or a check postdated by even one day, the seller's acceptance of the instrument insofar as third-parties are concerned amounts to a delivery on credit and the seller's remedies are set forth in the section of buyer's insolvency.

§8.2-702 (2), Code of Va., states that except as provided in §8.2-792 (2), the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or an intent to pay. The case of Re Helms Veneer Corp., 287 F.Supp. 804 (W. D. Va. 1968) construed §8.2-511, §8.2-702, Code of Va., holding that where the

seller failed to reclaim his goods within ten days from delivery of the goods, he waived his right to reclaim the goods, the seller has a remedy on the check which was returned for insufficient funds or for breach of contract, and the seller's rights are reduced to those of a general creditor.

Blocksom never made any written demand upon Prestige for return of the merchandise. The District Court in this case on appeal wrote in its Memorandum Order that Slone's representations demonstrate fraudulent misrepresentation sufficient to rescind the contract and allow recovery in conversion for the value of the goods shipped by plaintiff and subsequently disposed of by defendant. Such a holding is contrary to the two Virginia statutes above mentioned and is erroneous.

5. Blocksom never pleaded fraudulent misrepresentation as to the solvency of Prestige in its complaint nor in its two briefs in the court below. Recognizing this omission, after Blocksom rested its case, counsel for Blocksom moved the court for leave to amend the complaint to allege fraudulent misrepresentation by Slone. The court overruled said motion. After both sides rested, counsel for Blocksom argued successfully to the court that the failure to allege fraud in the complaint was cured by the pretrial order, containing Blocksom's contention that the two checks signed by Slone were given to the plaintiff as an inducement for the shipment of merchandise in March and April without any intention on the part of Slone to honor the checks and with prior intention to stop payment on them. Rule 8 (c) of Federal Rule of Civil Pro-

cedure, paragraph (c) states that in pleading to a preceding pleading, a party shall set forth affirmatively fraud.

Rule 9 (b) states that in all averments of fraud, the circumstances constituting fraud shall be stated with particularity. Owen v. Commercial Union Fire Ins. Co. of N.Y., 211 F. 2d 488 (4th Cir. 1954) reversed a judgment of a lower court for failure to comply with Rule 9 (b), of Federal Rule of Civil Procedure.

Blocksom also failed to comply with this rule. The final pretrial order is not a pleading contemplated by the Federal Rules of Civil Procedure. The order was entered three weeks before trial. There is no savings clause in the Federal Rules of Civil Procedure that if a party, pursuant to a local rule of a District Court, alleges in a Final Pretrial Order

that a party had made out post-dated checks with intent that they not be honored, there would be compliance with the Federal Rules of Civil Procedure.

6. Blocksom, through its credit manager, who was the sole witness at the trial for Blocksom, denied that Slone made any such misrepresentation in a December 1966 telephone conversation between Marks, Blocksom's credit manager, and Slone. In fact, Blocksom never took the position prior to the filing of the complaint in April 1977, that Slone personally was ever indebted to Blocksom. Furthermore, Blocksom failed to prove Prestige was hopelessly insolvent in March and April 1966. Prestige filed on May 31, 1977 a Chapter XI Petition in Bankruptcy.

CONCLUSION

The petition for certiorari should

be granted for the reasons set forth herein.

Respectfully submitted,

HOWARD I. LEGUM
Counsel for Norman Slone

Fine, Fine, Legum & Fine
720 Law Building
Norfolk, Virginia 23510

Counsel for Petitioner

CERTIFICATE OF SERVICE

Pursuant to Rule 33, paragraph 3 (b), I certify that service was made on respondent Blocksom & Company, by depositing three printed copies of the Petition for Certiorari in a United States mail box, with first class postage prepaid, addressed Israel Steingold, 913 First Colonial Road, Virginia Beach, Virginia, 23454, this 6th day of March,

1980.

HOWARD I. LEGUM
Attorney for Petitioner,
a member of the bar for
the Supreme Court of the
United States

O R D E R

Upon consideration of the appellant's petition for rehearing, by counsel,

IT IS ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Judge Russell, with the concurrence of Judge Haynsworth and Judge Widener.

For the Court,

William K. Slate, II
Clerk

Filed
December 7, 1979
William K. Slate, II
Clerk

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. J. Calvitt Clarke, Jr., District Judge.

Argued: April 5, 1979.

Decided: June 25, 1979.

Before HAYNSWORTH, Chief Judge, RUSSELL, and WIDENER, Circuit Judges.

Howard I. Legum (Fine, Fine, Legum & Fine on brief) for Appellant; Israel Steingold (Steingold & Steingold; Steingold & Chovitz on brief) for Appellee.

PER CURIAM:

Norman Slone appeals from a judgment entered against him individually for the value of certain goods furnished Prestige Spring Corporation (hereafter designated Prestige)[1] of which he was vice-president and secretary, by Blocksom & Company (hereafter designated Blocksom). He also appeals from the dismissal of his

counterclaim based upon the Virginia Statute of Insulting Words.[2]

The district court found that Slone had induced Blocksom to deliver to Prestige goods by his personal representation that Prestige was solvent and intended to pay for the goods, when he knew at the time that Prestige was hopelessly insolvent and had neither the ability nor the intent to pay for the goods so delivered by Blocksom. Slone appeals contending that the finding of the district court of fraudulent representation was clearly erroneous.

Upon review of the record and consideration of the briefs and oral argument, we are of the opinion that the findings of the district court are not clearly erroneous and we accordingly affirm the judgment granted by the district court in favor of Blocksom against Slone, and we,

also, affirm the dismissal of Slone's counterclaim for the reasons assigned by the district court.

AFFIRMED.

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[1]Prior to trial the defendant Prestige Spring Corporation was adjudicated a bankrupt and the action as to it was dismissed with prejudice.

[2]Virginia Code Section 8-630.

This action came on for trial before the Court, Honorable J. Calvitt Clarke, Jr., United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that the plaintiff, Blocksom and Company, recover of the defendant, Norman Slone, the sum of $18,891.15, with interest thereon at the rate of six per cent as provided by law, and his costs of action; and further directing that the counter-claim of defendant, Norman Slone, is denied.

Dated at Norfolk, Virginia, this 23rd day of January, 1978.

W. FARLEY POWERS, JR.
Clerk of Court

Filed
January 25, 1978
W. Farley Powers, Jr., Clerk

MEMORANDUM ORDER

This diversity action was tried on January 23, 1978, and the Court having found that defendant, Norman Slone, by fraudulent misrepresentations had converted for his corporation's benefit plaintiff's goods worth $18,891.15, entered judgment for plaintiff in that amount. Defendant Slone now moves for a new trial pursuant to Rule 59(a) and asks the Court to open the judgment previously entered, to make new findings of fact and conclusions of law, and to order judgment entered for the defendant.

The crux of defendant's legal argument is that since plaintiff knew at the time it received defendant's post-dated checks that there was then insufficient funds to cover them, there could be no fraudulent misrepresentations on defendant's part. Defendant relies chiefly on

Hubbard v. Commonwealth, 201 Va. 61, 109 S.E.2d 100, 104 (1959), where the Supreme Court of Virginia held that if ".... at the time the check is drawn or delivered to him, the payee has knowledge, or an understanding, that it is not then good or collectible, the offense [larceny by issuing a bad check] ...has not been committed."

However, this Court's finding of fraudulent misrepresentation in the present case was not based on the issuance of postdated checks but on defendant's independent representations that his corporation was solvent and intended to pay for the goods when in fact it was hopelessly insolvent and intended not to pay. These facts demonstrate fraudulent misrepresentation sufficient to rescind the contract and allow a recovery in conversion for the value of the goods ship-

ped by plaintiff and subsequently disposed of by defendant. See, Manly v. Ohio Shoe Co., 25 F.2d 384 (4th Cir. 1928). In this regard, it is noteworthy that the Court, in Hubbard v. Commonwealth, supra, sustained the defendants' conviction on the false pretences count of the indictment to which knowledge of the check's uncollectible status is not a defense.

The defendant has also argued that the promise to pay for plaintiff's goods was merely a representation of a future fact and as such cannot constitute fraud under Virginia law. However, this general rule admits of several exceptions and most courts recognize that "...fraud may be predicated on promises made with a present intention not to perform them ..." 37 Am. Jur.2d § 68 at 104 (1968). Virginia law, applicable in this diver-

sity suit, clearly recognizes this exception:

> The purpose of the plaintiff is to rely upon a qualification of the general rule of law, that an action based upon fraud must aver the misrepresentation of present pre-existing facts and cannot ordinarily be predicated on unfulfilled promises or statements as to future events. Were the general rule otherwise, every breach of contract could be made the basis of an action in tort for fraud...
>
> There are, however, some real and apparent exceptions. The Courts are not agreed as to all of these exceptions, but there is much authority to the effect that an action in tort for deceit and fraud may sometimes be predicated on promises which are made with a present intention not to perform them or on promises made without any intention to perform them. It has been stated that the gist of fraud in such case is not the breach of the agreement to perform, but the fraudulent intent. In the entire verbal consistency, some courts have held that the fraudulent purpose of the promisor and his false representation of an existing intention to perform, when such an intent did not exist, is the misrepresentation of a fact ...It has been said that the state of the promisor's mind at the time he makes the promise is a fact, and

> one which is exclusively within the promisor's own knowledge; so that, if he represents his state of mind - that is, his intention - as being one thing when in fact his purpose is just the contrary, he misrepresents a then existing fact. That is, when he expressly or impliedly avers that he has an existing intention to fulfill his promise, that intention is a fact, and if false and fraudulent is a fraudulent representation which may or may not supply the basis for an action in tort for the deceit ...
>
> So it has been frequently held that fraud may sometimes be predicated upon the failure to perform a promise where the promise is the device to accomplish the fraud.
>
> ...
>
> It is upon such alleged deceit and fraud that the plaintiff here bases his action. We are of the opinion that an action for such deceitful and fraudulent promises as are here alleged may be maintained, but only where there are supporting allegations of diligence and readiness on the part of the plaintiff and refusal to perform by the defendant and resulting damage. (citations omitted)

Lloyd v. Smith, 150 Va. 132, 142 S.E. 363

365-366 (1928). Accord, Mears v. Accomac Banking Co., 160 Va. 311, 168 S.E. 740, 743-44. Cf. Tucker v. Owen, 94 F.2d 49 (4th Cir. 1938).

The exception stated above clearly applies in the present case where the Court has found on clear and convincing evidence a fraudulent intent not to pay at the time the promises of payment were made, shipment of goods by the plaintiff induced by these knowingly false promises, and subsequent refusal by defendant to pay.

The Court for the above reasons believes it has correctly formulated the rule of law applicable to the facts of this case. Further, the Court is unpersuaded that defendant's proposed findings of fact are a more accurate version of events than its own and therefore, refuses to amend its findings.

Accordingly, defendant's motion is DENIED in all respects.

United States District Judge

February 10, 1978

Norfolk, Virginia

This action came on for hearing before the Court, Honorable J. Clavitt Clarke, Jr., United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that the motion for new trial of the defendant, Norman, Slone, is denied in all respects. Dated at Norfolk, Virginia, this 10th day of February, 1978.

W. FARLEY POWERS, JR.
Clerk of Court

Filed
February 13, 1978
W. Farley Powers, Jr., Clerk